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Rising Powers in Complex Regimes: South African Norm Shopping in the Governance of Cross-Border Investment

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Abstract

This article offers a critical engagement with literatures on contemporary global power shifts and the phenomenon of 'regime complexity'. It does so by focusing on South Africa's role in the governance of cross-border investment, and using this case to explore the strategies used by rising powers to pursue their strategic aims in institutionally complex and fragmented global governance regimes. The article situates an understanding of regime complexity within a critical constructivist literature that highlights the ambiguity of international norms and the relationship between power and strategic rhetorical action. It argues that complex regimes create space for agency and strategic action by states and highlights one specific strategy – norm shopping – that rising powers can use to legitimate their actions and challenge dominant norms in complex regimes.

Keywords: Cross-border Investment, Regime Complexity, Rising Powers, South Africa, Constructivism

Introduction

It is no surprise that contemporary interest in the phenomenon of international 'regime complexity' (Raustiala and Victor 2004) – a situation in which governance is fragmented into a series of overlapping organisations, rules and norms – coincides with a period characterised by dramatic shifts in global economic power. Materialist understandings of state power dominate conventional accounts of the causes and consequences of regime complexity. In brief, the fragmentation of international institutions is often understood as a result of the decline of hegemony and rise of multipolarity, while its consequence is generally thought to be a shift from rules-based to power-based modes of international politics (Drezner 2009, 2010, 2013). Assuming that regime complexity is an important emergent feature of the global political landscape, however, the conventional preoccupation with the material power of states obscures important questions about its political consequences. Namely, how do those states outside of a core group of great powers engage with institutionally complex governance landscapes?

In the context of this special issue, this is an important question for those countries that are counted, or count themselves, amongst the ranks of 'rising powers'. Their growing power is typically viewed in terms of rapid economic growth and a rising share of global wealth (see, for example, Arrighi 2007, Drezner 2007, Emmott 2008, Ikenberry 2008, Wade 2011, Zakaria 2011; for a critique, see Hopewell 2015). Yet the reality is that many of those that are conventionally categorised as rising powers – Brazil, South Africa, Indonesia, Turkey, Mexico – do not come close to matching the clout of either the established global powers or the largest rising power, China, when measured in these terms (see Bishop 2016). Their commonality is better thought of as an intersubjective identity as 'rising powers' and a broadly defined agenda for the reform of global economic governance, as opposed to a set of objective material characteristics. This raises the question of how such moderately resourced but ambitious states can engage with and hope to shape patterns of global economic governance in the context of institutional complexity.

This article explores this question through the case of South Africa, a mid-sized power but one that is part of various forums and coalitions that indicate rising power status – including the BRICS and G20 – and that is keen to construct its own image as an important player in the reform of global governance. Specifically, it investigates South Africa's strategies for engagement with the regime complex for cross-border investment. Here, in the context of considerable institutional fragmentation and complexity, South Africa has sought to challenge core normative tenets of the investment regime, both in its domestic investment policies and through its interventions in the wider regime.

In order to understand these strategies, I depart with materialist accounts of regime complexity to instead explore this phenomenon through a critical constructivist lens. This focuses attention on the normative ambiguity and opportunities for strategic action that are created by regime complexity, while stressing the strategic use of rhetoric as a power resource by states. Using this lens, I develop the concept of 'norm shopping' as a way of understanding how rising powers can navigate complex regimes in strategic ways: this is the selective use and construction of norms situated within complex regimes in order to legitimate policy proposals or negotiating positions. In this way, as well as being shaped by material inequalities, power is constructed through strategic discursive engagement with the complex institutional environment in which states find themselves. I argue that norm shopping is a particularly useful strategy for rising powers that are seeking to contest aspects of the prevailing international order.

The article proceeds in four main sections: the first outlines my theoretical approach to power and ambiguity in complex regimes and introduces the concept of norm shopping; the second provides a brief historical account of the emergence of the global governance regime for cross-border investment; the third offers a detailed examination of South Africa's use of norm shopping in its investment policy rhetoric; and the fourth considers the future of the investment regime in the light of the preceding discussion.[1] Taken as a whole, the case of South Africa's engagement with the governance of cross-border investment highlights the way in which

regime complexity generates ambiguities that allow space for engagement and contestation by rising powers.

Norm Shopping in Complex Regimes

The contemporary literature on regime complexity and its political consequences has its origins in classic IPE debates about hegemonic stability and the theories of international regimes that emerged from the latter. Early theories of hegemonic stability asserted that an open international economic order was most likely to emerge and persist under conditions of hegemony (Gilpin 1972, Kindleberger 1973, Krasner 1976, Keohane 1980). Increasing attention on regimes – defined by Stephen D. Krasner (1983) as sets of explicit or implicit principles, norms, rules and decision-making procedures in a given area of international politics – coincided with perceived US hegemonic decline beginning in the 1970s. Liberal institutionalists, in particular, stressed the capacity of regimes to sustain international cooperation and openness even in the absence of a hegemon (Keohane 1984).

Despite their acknowledgement of the role of regimes in governing the global economy, Realists in particular retained a central concern with state power and interests (see, for example, Krasner 1983). With this in mind, they observed the way in which great powers used strategic forum-shopping in order to realise desired outcomes (Drezner 2010). In the area of trade, for example, a longstanding strand of literature identifies the tendency of large powers to seek to negotiate preferential trade agreements (PTAs) outside the multilateral arena during periods of deadlock in the latter (Schott 1989, Bergsten 1996, Bhagwati 1993, Krugman 1993, Panagariya 1998). Furthermore, trade scholars frequently suggest that deadlock in multilateral negotiations and associated institutional fragmentation is most likely in the context of multipolarity, when no individual power is strong enough to force through its agenda.[2]

Building on this foundation, the emerging literature on international regime complexity presents a compelling case that the proliferation of overlapping rules, norms and organisations is becoming an increasingly salient issue in many areas of global politics (Goldstein *et al*. 2001,

Raustiala and Victor 2004, Aggarwal 2005, Alter and Meunier 2006, 2009, Benvenisti and Downs 2007, Drezner 2013, Orsini *et al*. 2013, Gehring and Faude 2014, Gómez-Mera 2015). In its assessment of the political implications of this phenomenon, the dominant strand in this literature picks up the thread of earlier Realist work on regimes, emphasising the power of states to shape and navigate institutional landscapes. Specifically, the argument here is that the fracturing of multilateral institutions and the proliferation of overlapping governance venues and norms presages a shift from rules-based to power-based modes of international politics. This is because complex regimes provide opportunities for forum shopping by great powers, allowing those with superior material capabilities and state capacity to navigate overlapping rules and organisations in ways that maximise their leverage (Drezner 2009, 2013, see also Raustiala and Victor 2004, Alter and Meunier 2009). Scholarship on the fragmentation of international legal systems has reached similar conclusions (Benvenisti and Downs 2007).

Some scholars have questioned the conclusion that regime complexity necessarily leads to power-based political outcomes (Alter and Meunier 2009, Gehring and Faude 2013, Orsini *et al*. 2013). However, as yet there has been little exploration of how those states outside of the core group of great powers engage with or respond to situations of institutional complexity at the international level. This is at least in part a consequence of the dominance of materialist conceptions of state power in the regime complexity literature, which tends to obscure the relevance of 'weaker' states and their actions. As a corrective to this, I turn to constructivist literatures in IR and IPE. Where both Neoliberal Institutionalist and Realist scholars consider regimes to be the product of interaction between rational utility-maximising actors, a now-extensive constructivist literature draws attention to the way international rules and norms shape actors' identities and interests (see, *inter alia*, Finnemore and Sikkink 1998, Keck and Sikkink 1998, Finnemore 2003, Hall 2003, Barnett and Finnemore 2004). Of particular relevance is a branch of 'critical' constructivism that deals with the ambiguity of social norms and their relationship to power.

Antje Wiener has been most influential in highlighting the ambiguity and contestedness of norms in international politics. Specifically, she rejects the 'behaviourism' of research that treats norms as fixed social facts and instead proposes a 'reflexive' understanding of norms (Wiener 2004, 2007). This emphasises the 'dual quality' of norms as both structuring state behaviour and constructed by it. As such, Wiener (2004, p. 200) views norms as 'always in principle contested' (for a critique of Wiener's approach, see Niemann and Schillinger 2016). In a similar vein and engaging explicitly with regime theory, Kees van Kersbergen and Bertjan Verbeek (2007) argue that norm research should consider the vague and elusive quality of norms, as opposed to simply whether they are obeyed or disregarded. Such an approach permits a view of norms that sees them as contested and contestable, and challenges conventional views of norm diffusion as a top-down process that flows from Global North to Global South (see Epstein 2012a, Bloomfield 2016, Wiener 2017, Zimmerman *et al*. 2017).

While critical constructivists highlight the ambiguity and contestedness of norms, they rarely engage explicitly with the issue of complexity. Van Kersbergen and Verbeek (2007, p. 223) point out that conventional norm research has tended to conclude that denser and more complex regimes will result in rules-based outcomes as states lose control over norms and instead opt for compliance. This, however, assumes that the norms embodied in dense and complex regimes are coherent and unambiguous and that states interpret and respond to them in uniform ways. Van Kersbergen and Verbeek (2007) call this assumption into question through their examination of the contestation of norms within the highly legalized context of the European Union. Building on this, I suggest that in situations of regime complexity normative ambiguity is likely to be pronounced: competing or contradictory norms may exist in different organisational settings, norms may be combined in different ways in different parts of a regime complex, and different organisational settings may create opportunities for reinterpreting or reconstructing existing norms. Consequently, the ambiguities created by such complexity create space for creative agency that extends beyond the great powers.

To capture the agency of both materially strong and weaker states, I turn to critical constructivists who have dealt with the issue of power. Conventional norm research has tended to treat ideas and power as separate and competing modes of explanation, arguing that norms spread through rational processes of persuasion and socialisation rather than coercion (for critiques, see Krebs and Jackson 2007, Epstein 2012a, 2012b). By contrast, I follow Ronald R. Krebs and Patrick Thaddeus Jackson (2007) in suggesting that norms and power are intricately intertwined. Through their concept of 'rhetorical coercion', they argue that the maintenance of rule by the powerful rests on legitimacy generated through rhetorical action: the task for actors seeking to project power by establishing legitimacy is thus to talk their opponents 'into a corner' (Krebs and Jackson 2007, p. 36). Furthermore, successful strategies for doing so are embedded within 'communities of discourse', in which actors must draw on shared rhetorical tools in order to make claims that are 'socially sustainable' (Krebs and Jackson 2007, p. 45–7). Another way of putting this – and linking it back to the earlier discussion of regimes – is to suggest that the rhetorical action of purposive agents is structured by the norms that are present in regimes. These set the parameters of socially sustainable rhetorical action, albeit in ways that are ambiguous and open to interpretation and contestation.

Krebs and Jackson (2007, p. 55–7) suggest that, on the whole, rhetorical coercion is likely to be less frequent and effective in international politics than in the domestic arena, where social ties in political communities are denser. However, other scholars have pointed to the ways in which weaker states have used similar modes of strategic rhetorical action as a power resource in the international arena. For example, Hobson and Seabrooke's (2007) concept of 'mimetic challenge' describes a strategy in which weaker actors make discursive appeals to established institutional rules, norms or standards in order to legitimise their own actions or to challenge the behaviour of more conventionally powerful actors (see also, Schimmelfennig 2001, Sharman 2007).

Pulling these insights from the regime complexity and critical constructivist literatures together, I propose the concept of 'norm shopping' as a way of capturing the strategic ways in which

conventionally weaker states can engage with the ambiguous and uneven normative landscape that is created by the existence of overlapping and intersecting rules, norms, standards and practices in international politics. In conventional accounts of the political implications of regime complexity, 'forum shopping' describes the process by which powerful actors select regulatory or negotiating venues that will maximise their material leverage – for example by bypassing multilateral institutions that create opportunities for weaker actors to engage in coalition-building and issue-linkage. 'Norm shopping', by contrast, describes a strategy in which actors selectively engage with *norms* situated within complex regimes in order to make rhetorical arguments that help to legitimate their actions.

Specifically, where contradictory or ambiguous norms exist within a complex regime the strategy of norm shopping involves states and their diplomatic agents constructing policy choices or negotiating positions as legitimate through selective appeal to norms that exist – or that can be (re)constructed – within specific parts of a complex organisational setting.[3] Importantly, these norms may not be reflected in the dominant normative character of the regime complex as a whole. Through the case study of South African investment policy below, I describe two discursive tactics that come under the broad heading of norm shopping. These are (1) the use of norms contained in an overarching multilateral institution in order to legitimise behaviour in nested regional or bilateral negotiations; and (2) shaping or developing new norms in a parallel or peripheral organisational setting before applying them to justify action in another part of a regime complex. This is not an exhaustive typology of norm-shopping strategies, but is indicative of the sort of strategic opportunities for discursive action that may emerge in complex, nested and interconnected institutional settings.

My contention is that norm-shopping strategies are particularly useful for states that identify as rising powers and that are seeking the reform of global economic governance through their increasingly active engagement. Clearly, a substantial degree of bureaucratic and diplomatic capacity is required for states to engage with multiple forums across complex regimes, something that may be more feasible for larger and ambitious states from the Global South than

for other developing countries. Nonetheless, these strategies are open to aspiring rising powers like South Africa that cannot come close to matching the conventional power resources of either the established great powers or larger rising powers. The active construction of rising power identity may also be important in gaining access to debates and negotiations taking place in exclusive organisational settings in emerging regime complexes – for example, the BRICS group or the G20. Beyond this, a norm-shopping strategy can support reform agendas that are associated with rising powers' engagement with global economic governance. Specifically, the incoherence and ambiguity that is generated by complexity may provide opportunities for rising powers to challenge dominant norms within existing regimes.

Institutionalising 'Investment Protection and Liberalisation' in the Investment Regime Complex, 1945-2000

This section briefly describes the institutionalisation of 'investment protection and liberalisation' as the dominant norm in the investment regime complex that emerged after 1945.[4] The core principles that underpinned this norm can be loosely summarised as follows: (1) international investment flows increase overall global prosperity; (2) inward investment promotes economic growth, efficiency and competitiveness at the national level; therefore (3) state restrictions on the establishment of foreign investment should be limited (investment liberalisation); and (4) foreign investment should be encouraged by establishing property rights for investors in international law (investment protection). The partial and uneven institutionalisation of the 'investment protection and liberalisation' norm in the form of an investment regime complex was the result of an incremental and contested process of negotiation between capital-exporting developed countries and capital-importing developing countries in this period.

From 1945 to the late 1970s, the dominant norm described above was broadly opposed by developing countries, which generally favoured limits on investment liberalisation and resisted international legal protections for foreign investors. As a result, attempts to bring about binding investment provisions in multilateral institutions – including the abortive International Trade

Organisation, the United Nations (UN) and the Organisation for Economic Co-operation and Development (OECD) – all met with failure. Instead, European countries and later the United States pursued protection for their overseas investors via a network of Bilateral Investment Treaties (BITs), which became a central pillar of the investment regime complex. These almost all included commitments that proscribed discrimination and expropriation in the post-establishment phase, while also providing a variety of other protections for foreign investors, often in broad and vague terms (Bonnitcha *et al*. 2017, p. 26). BITs lacked an overarching multilateral focal point, but were promoted by various multilateral institutions – including the World Bank, the UN Conference on Trade and Development (UNCTAD) and the OECD – from the 1980s onwards (Poulsen 2015). Their proliferation was also accompanied by the development of a set of arbitration institutions, foremost amongst which was the International Centre for the Settlement of Investment Disputes (ICSID) at the World Bank. Although many developing countries had earlier rejected the notion of special protections for foreign investors in multilateral forums, through BITs they committed themselves to treaty obligations that provided protections beyond national treatment and outside domestic legal regimes, seemingly in the belief that this would serve to attract inward investment (Bonnitcha *et al*. 2017, p. 13, Poulsen 2014, 2015).

Alongside the proliferation of BITs, the US renewed efforts to enshrine substantive protections for investment in the multilateral trade regime as part of the Tokyo (1973-9) and Uruguay (1986-94) rounds in the General Agreement on Tariffs and Trade (GATT), once again with limited success (Bonnitcha *et al*. 2017, p. 191). The Uruguay Round's conclusion brought only minimal investment liberalisation via the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Investment Measures (TRIMS) (Reiter 2006, p. 216–7). In this context, investment liberalisation and protection increasingly became the purview of regional and bilateral PTAs, the aim of which was to advance a 'deep' trade liberalisation agenda that had stalled in the multilateral arena (Vandevelde 2005, Heron and Siles-Brügge 2012, Siles-Brügge 2014). This began with the North American Free Trade Agreement (NAFTA) (1994), which included national and most-favoured nation (MFN) treatment for

investment in the pre- and post-establishment phases (Bonnitcha *et al*. 2017, p. 18). This became the model for further US PTAs, while pre-establishment investment liberalisation was increasingly also incorporated in EU PTAs from the late 1990s onwards (Bonnitcha *et al*. 2017, p. 18). By the 2000s, comprehensive PTAs were becoming the preferred model for investment liberalisation and protection on the part of capital-exporting developed countries. Where BITs lacked a multilateral focal point, PTAs were nested under the GATT/WTO in the trade regime and partially governed by Article XXIV of the GATT, which sets out criteria by which states can engage in preferential trade liberalisation, albeit concerning goods only and not other trade-related issues.

Taking all this together, the norm of 'investment protection and liberalisation' had come to dominate the investment regime complex that had emerged by the late 1990s. Yet the complexity that was produced by the *ad hoc* process through which the regime was created meant that the institutionalisation of this norm was incomplete. The network of investment rules contained within BITs and PTAs – as well as its links to embedded and evolving sets of norms in various parts of the landscape of global economic governance, from the GATT, to UNCTAD, the OECD and the World Bank – created opportunities for rising powers to use selective engagement with existing aspects of the regime complex in order to challenge its central norm.

South Africa's Norm-Shopping Strategies in the Investment Regime Complex, 1994-2017

During the period following South Africa's transition to democracy in 1994, the governing African National Congress' (ANC) economic policy shifted from an embrace of the prevailing neoliberal economic orthodoxy in the late 1990s towards an increasingly state-oriented and interventionist economic strategy from the 2000s onwards.[5] It engaged actively with the global economic governance landscape throughout this period, but from the mid-2000s adopted more reformist aims. South Africa's position on the governance of investment mirrored these broader shifts. Specifically, the government moved from embracing the dominant 'investment protection and liberalisation' norm in the late 1990s to instead adopting a 'regulated investment' norm from the mid-2000s onwards. The latter does not reject the core principle that foreign

investment is good for economic growth, but (1) argues that investment should be regulated by the state if it is to have a positive impact, and (2) favours domestic regulation of investment over international treaty commitments. In order to legitimate its position, South Africa navigated the complex landscape of the investment regime using a norm-shopping strategy. Specifically, in what follows I trace two tactics deployed to exploit the complexities and ambiguities of the investment regime in order to advance and legitimate a position that diverged from the dominant norm.

Strategy 1: Leveraging WTO Norms in PTA Negotiations

The first example of norm shopping involved a discursive strategy that linked a set of inter-regional negotiations back to the overarching multilateral organisation under which they were nested to combat attempted forum shopping by a more conventionally powerful player. The context for this was successful developing-country resistance to efforts to further embed the 'investment protection and liberalisation' norm within the World Trade Organisation (WTO). When the EU sought investment liberalisation through a series of PTAs as an alternative governance venue, South Africa contested this by linking these negotiations back to the rules and politicised debate that had emerged in the WTO.

Following the conclusion of the Uruguay Round, the EU saw the launch of a new round of multilateral negotiations under the WTO as an opportunity to introduce multilateral rules on transparency, national treatment and dispute settlement in investment (Woolcock 2011, p. 142). Brussels therefore pushed for the launch of a round that would include investment alongside three other 'new' trade issues – competition, public procurement and trade facilitation – known collectively as the 'Singapore issues'. While their view of the issue of multilateral investment rules was ambiguous at that time,[6] South African trade officials initially supported the launch of a broad-based trade round. In line with prevailing WTO norms, they argued that any new round should allow scope for reciprocal trade-offs between developed and developing countries in order to produce a balanced outcome (Keet 2005).

After the launch of the Doha Round, however, South African trade officials became increasingly cautious about calls for trade and regulatory liberalisation. South Africa therefore joined the ranks of more sceptical developing countries – first under the IBSA (India, Brazil and South Africa) group and then as part of the G20-T group of developing countries working within the WTO. These groups accused developed countries themselves of violating the WTO norm of reciprocity in their approach to the negotiations (see Efstathopoulos 2015, Hopewell 2016). South African officials stressed that they had only agreed to the inclusion of the Singapore issues on the promise of improved agricultural market access from the EU and the US (World Trade Organization 2003, p. 9) and that they were not willing to make 'painful concessions' on issues such as investment in the absence of reciprocation from the North (World Trade Organization 2004, p. 44). Talks on investment ultimately broke down following the infamous Cancún Ministerial in 2003.

According to existing theories of forum shopping, the EU should have been able to respond to the multilateral impasse by shifting its attention to alternative settings in which it could more readily deploy its market power. This is precisely what the EU attempted to do. Its response to the failure of the Cancún Ministerial and the ejection of three of the four Singapore issues from the Doha Round was to launch its *Global Europe* strategy in 2006. This centred on the pursuit of agreement on a range of regulatory issues, including investment, via deep PTAs with key trade partners. At the same time, the EU was pursuing a series of 'Economic Partnership Agreements' (EPAs) with African, Caribbean and Pacific (ACP) countries, including South Africa. These PTAs were designed as a replacement for the system of non-reciprocal trade preferences that the ACP group had received under the Lomé Convention since 1975 (see Murray-Evans 2019). While the EPAs were not formally part of the *Global Europe* strategy, the European Commission became increasingly insistent during the course of the negotiations that they should include binding commitments on investment and other trade-related regulatory issues (Siles-Brügge 2014, p. 130–41, Heron and Siles-Brügge 2012). In relation to investment specifically, Brussels sought liberalisation commitments including the prohibition of a variety

of instruments used to limit foreign investment and MFN treatment in the pre-establishment phase (Van Harten 2008, p. 1–2).[7]

South Africa played a leading role in resisting the inclusion of investment (as well as the other Singapore issues) in the EPAs through a norm-shopping strategy. Having rejected the WTO as a site for new investment rules, discursive appeals to this organisation and its rules nonetheless served South Africa's purpose in resisting a similar set of rules via PTA negotiations. Indeed, the EU's original rationale for the launch of the EPA negotiations was the need to render existing EU-ACP trade relations under the Lomé Convention compatible with WTO rules (Heron 2011). In order to do this, the European Commission argued, this relationship would need to achieve conformity with GATT article XXIV, which requires reciprocal liberalisation of trade in goods in PTAs (see Heron and Murray-Evans 2017). South Africa contested the EU's desire to include the Singapore issues in the EPAs by stressing the limits to WTO requirements set out by article XXIV and by linking the EPAs to the politicised debate over investment and the other Singapore issues that had taken place in the WTO.

In the strategic negotiating framework drawn up in 2006 by South Africa and its regional partners in the Southern African Development Community (SADC) EPA negotiating group, the region acknowledged the need to obtain compatibility with article XXIV by offering reciprocal tariff reductions to the EU (SADC 2006, p. 2).[8] However, South African actors used this same multilateral rule to contest the inclusion of investment in the agreements. The SADC negotiating framework made it clear that Article XXIV covered trade in goods only, with no mention of the Singapore issues and that consequently 'there [was] no compulsion to negotiate the so-called new generation trade issues under the EPA to meet the requirements of WTO compatibility' (SADC 2006, p. 4). South Africa and its SADC partners also made clear in this document that the proper place for negotiations on investment was at the WTO, where developing countries had opposed the EU's agenda. They argued: 'by negotiating these issues bilaterally, SADC EPA Member States would be complicit in bypassing WTO negotiations or prejudging its negotiating positions in the Doha round' (SADC 2006, p. 5).

When the deadline for the EPA negotiations arrived at the end of 2007, South Africa and the EU had reached a stalemate. South African Minister of Trade and Industry Rob Davies placed the blame for this squarely on the shoulders of the EU. He again stressed South Africa's willingness to reach a deal that would be compatible with WTO rules and used those rules to make the case that there was no requirement to include investment or the other new generation issues in any such deal:

> In the SADC region, the major problems have in fact arisen from the EU's ambition to move the EPAs beyond WTO compatible free trade agreements covering trade in goods, to agreements also embracing trade in services and new generation issues, involving serious commitments in areas such as investment, government procurement, competition policy and the like (Davies 2008).

South Africa's chief trade negotiator, Xavier Carim (2009, p. 54), reiterated the point in 2009, arguing, 'At the heart of the difficulties in EPA lies the disjuncture between the declaratory principles that launched the negotiations and the ambitions of the EC that go far beyond the need to transform ACP-EU trade relations into a WTO compatible arrangement.' In addition, the South African government again justified its opposition to the inclusion of the Singapore issues in the EPA by stressing that these issues had 'been excluded' from the WTO (Department of Trade and Industry 2008).

Other ACP countries and European civil society organisations joined South Africa in highlighting the tension between the EU's own claims that the EPAs were designed to achieve compatibility with the relevant WTO rules covering free trade agreements and the substance of the EU's negotiating position (see Del Felice 2012, Girvan 2012, Heron and Murray-Evans 2017, Murray-Evans 2019). These tactics ultimately bore fruit as EU Trade Commissioner, Catherine Ashton, conceded that there would be 'no question of forcing' the inclusion of the new-generation issues into the EPAs against ACP wishes (Ashton 2009). The deal that was

eventually concluded between the EU and the SADC group in 2014 included no binding rules on investment or other regulatory issues, only rendezvous clauses requiring the parties to discuss these issues at a later date. There appears little prospect that these commitments to further discussions about investment under the EPA will be fulfilled.[9]

Strategy 2: Engaging UNCTAD on Bilateral Investment Treaties

Unlike with PTAs, there was no clear single multilateral focal point under which BITs were nested. South African officials consequently adopted a different type of norm-shopping strategy in order to justify their decision to roll back existing commitments in favour of a 'regulated investment' approach. Namely, they engaged with the development of a new set of norms in an organisation that was linked horizontally to the BITs regime before using these new norms to help to justify and legitimise their actions in the central BITs regime itself. More specifically, South African officials contributed to the emergence of new thinking on development and investment governance within UNCTAD before using this to help justify their decision to terminate a series of BITs.

The ANC government's decision to sign a series of BITs with European countries[10] in the late 1990s reflected the proliferation of this type of agreement at that time, as well as the government's liberal foreign economic policy stance. In a context in which attracting increasing levels of inward investment was central to generating rapid economic growth, South African officials reportedly saw BITs as a 'risk-free instrument to attract investment' (Poulsen 2014, p. 8). A more critical stance towards BITs first emerged following two investor-state legal cases brought under these treaties in the 2000s (for details, see Department of Trade and Industry and Department of Mineral Resources 2010).[11] These cases made South African government officials aware of the potential under BITs for legal challenges to domestic policies that had been arrived at through democratic processes.[12]

The government subsequently launched a three-year review of South Africa's investment policies in 2007. It identified a series of concerns about existing BITs, including misalignment

with rules on expropriation in the South African constitution, a lack of any clear relationship between BITs and increased inward investment, and the imprecise legal terms of the agreements and their enforcement through opaque and unpredictable processes of international arbitration (Department of Trade and Industry 2009). The review culminated in a decision by the Cabinet in 2010 that South Africa should refrain from signing new BITs, should review those signed in the 1990s with a view to termination and possible renegotiation, and should strengthen domestic legislation in relation to the protection of foreign investors (Carim 2015, p. 4). BITs with Germany, Switzerland, the Netherlands, Belgium and Luxembourg, Spain, Austria, Denmark, France and the UK were subsequently terminated, a brake on the signing of new BITs imposed, and consultation on a new Promotion and Protection of Investment Bill (later the Protection of Investment Act) began.

South African officials worked hard to persuade both domestic and international stakeholders – public and private – of the legitimacy of their decision. Where other developing countries used populist rhetoric to justify a turn against the prevailing investment regime,[13] South Africa took a more conciliatory approach that sought to avoid the impression that the government was abandoning international standards of investment governance or abrogating its commitment to the protection of foreign investments altogether. An extensive domestic policy review and consultation process was a major part of this effort (Mossallam 2015). Alongside this, South Africa also sought active engagement with an emerging international debate about the future of investment governance across a range of organisational settings linked to the network of BITs.

Between 2009 and 2012, South Africa used a series of 'Freedom of Investment Roundtables' hosted by the OECD as one venue for communicating its rationale for terminating BITs to external partners (see, in particular, OECD 2012, p. 7–9).[14] Officials also took the opportunity to test the ideas emerging from their BITs review by engaging with discussions on investment in the G8+5 (Canada, France, Germany, Italy, Japan, the UK, the US and Russia, plus Brazil, China, India, Mexico and South Africa) in 2008 and 2009.[15] However, UNCTAD proved to be

the organisational setting that was most amenable to South Africa's new approach to regulating investment.

UNCTAD played an important role in the evolution of the contemporary investment regime, in particular by spreading 'the causal belief that [BITs] were important to attract foreign investment' to developing countries during the 1990s (Poulsen 2015, p. 71). A shift in UNCTAD's orientation towards a more critical and questioning approach from around 2010 (Poulsen 2015, p. 99) dovetailed with South Africa's own critical stance that had emerged in the years immediately before. The country's officials were therefore able to both contribute to debates emerging in UNCTAD in order to further the latter's critique of BITs, and use UNCTAD outputs to help legitimate their own termination decision. Shortly after the South African investment policy review, UNCTAD responded to what it referred to as a 'a new generation of investment policies' that aimed to 'regulate investment in pursuit of public policy objectives' (UNCTAD 2012, p. 4–5). The South African review was an important part of this trend, and was used explicitly as an example of the growing questions surrounding BITs by the body's officials.[16] Its move to reflect on new trends in investment policy was also a response to the Seoul Declaration of the G20 from 2010, for which South Africa was co-chair alongside Korea, and which had made commitments to strengthening the sustainable development dimension of investment policies (UNCTAD 2012, p. 1).

This, in turn, led to the launch of UNCTAD's Investment Policy for Sustainable Development (IPFSD) in July 2012. This acknowledged that states were beginning to play a greater role in governing economies and described an emerging investment policy outlook that 'reflects the recognition that liberalization, if it is to generate sustainable development outcomes, has to be accompanied – if not preceded – by the establishment of proper regulatory and institutional frameworks' (UNCTAD 2012, p. 5). In light of this, the document set out principles to guide investment policymaking and a menu of options for developing countries in relation to both national investment policies and the design and use of international investment agreements.

UNCTAD reportedly actively sought the participation of high-level South African Department of Trade and Industry (DTI) officials in forums in which the issue of investment for sustainable development was discussed.[17] The latter took the opportunity to engage with this process: they articulated a view of investment regulation that was critical of core tenets of the established network of BITs and chimed closely with the new UNCTAD approach. At a launch event for the IPFSD held in South Africa in July 2012, the aforementioned Davies (2012b) drew a sharp distinction between a 'Freedom of Investment Model (FOI)' that had shaped the BITs regime and 'an Investment for Sustainable Development Model (ISD)' now associated with UNCTAD. The latter approach, he said, 'posits that regulations are needed to balance the economic requirements of investors with the need to ensure that investments make a positive contribution to sustainable development in the host state' (Davies 2012b). Officials repeatedly aligned their own approach with the language of 'sustainable development' used in the IPFSD and suggested that BITs signed in the 1990s represented an out-dated approach based on the 'Freedom of Investment' model (Davies 2012a, 2012b, 2016, Carim 2015). In this way, they were able to draw on debates and emerging norms within UNCTAD in order to challenge aspects of the dominant 'investment protection and liberalisation' norm (or, as it was called by South African officials, the 'freedom of investment' model).

In designing the Protection of Investment Act that would replace the BITs, South Africa's engagement with UNCTAD again provided a way to bolster its approach. The Act replicates a number of features of BITs, but deviates in crucial aspects with the aim of redressing the perceived imbalance between investor protections and regulatory space for the state. A key change is that foreign investors do not have access to international arbitration for the resolution of disputes, which will instead be handled by a mediation process managed by the DTI.[18] The UNCTAD IPFSD guidelines were reportedly important in helping South African officials to shape the Act.[19] The Director of the Investment and Enterprise Division at UNCTAD, James Zhan, was invited to give evidence on it to the South African Parliamentary Trade and Industry Committee. He stated that 'the Bill holds well with new international norms as well as

UNCTAD's Investment Policy Framework' and 'applauded the progress [the government] had made in keeping up with evolving international norms' (Trade and Industry Committee 2015).

The reception to South Africa's decision to terminate its BITs was mixed and there was criticism, in particular, from European Commission officials, European state diplomats and chambers of commerce (Woolfrey 2013, Allix 2015). However, some European officials ultimately acknowledged that they understood and sympathised with South Africa's reasons for terminating the BITs and stressed that their main objection was not to the substance of this decision but to procedural issues related to the termination process.[20] A South African official suggested that, while the country had received significant pushback in the first two or three years after it announced the decision to terminate, this had subsequently been accepted by the relevant partners.[21] There has been concern over sluggish investment in South Africa subsequently,[22] but conclusively linking these outcomes is extremely difficult given the complexity of factors that influence decisions by inward investors. Indeed, European officials cited a range of issues, including a generalised rise in political uncertainty under the Zuma Presidency, as important factors affecting inward investment beyond the decision to terminate BITs.[23] They also suggested that, although South Africa was seen as becoming more interventionist in its investment policy, it was far from reaching a 'tipping point' in which investors would be discouraged from entering the market altogether.[24] Although there has been a rise in inward investment from other partners – notably China – the European countries with which South Africa chose to terminate BITs remain by far the country's most important sources of inward investment (Santander 2017). What is clear from this discussion is that South Africa's engagement with UNCTAD was an important part of the process of shifting and justifying its approach towards the prevailing investment treaty regime. Furthermore, this made sense precisely because UNCTAD was involved in a process of questioning the utility and appropriateness of BITs for developing countries when South Africa was doing likewise.

South Africa and the Future of Investment Governance

South Africa's domestic reforms and engagement with the broader investment regime were part of a broader questioning of the 'investment protection and liberalisation' norm. European countries expressed similar concerns about the investment provisions in negotiations for the proposed Transatlantic Trade and Investment Partnership (TTIP) with the US (Mossallam 2015, p. 26). The South African approach helped to shape some of these debates. European civil society organisations cited South Africa's decision to abandon BITs in support of their opposition to proposed investment provisions in TTIP (see for example CEO 2013a, 2013b, 2014).[25] South African officials were also asked to discuss their experiences in reviewing and terminating BITs in European countries as part of TTIP debates.[26]

Investment has simultaneously been an important part of discussions in new global forums, most notably the G20's Trade and Investment Working Group established by China during its 2016 Presidency. The appearance of this issue at the G20 is at least in part a reflection of China's transition from net inward investor to net capital exporter, and is an agenda being driven by China, Brazil, Russia and Argentina (Singh 2017). UNCTAD's IPFSD helped to shape a set of non-binding Guiding Principles for Global Investment Policymaking adopted by the G20 at the Hangzhou summit in 2016. UNCTAD facilitated discussions of the guidelines and the final document drew on the IPFSD (Zhan 2016, UNCTAD 2016). One South African official described this document as a compromise between the previously dominant 'freedom of investment' paradigm and the 'investment for sustainable development' paradigm that had shaped South Africa's BITs policy.[27] The same official suggested that a relative consensus had emerged on the need for reform of the international treaty framework for investment, but not on the direction that this reform should take.[28] Separately, EU proposals for the creation of a multilateral investment court have likewise been understood as part of a process of incremental reform of the investment regime (Bonnitcha *et al*. 2017, p. 30).

Debate on investment in the G20 subsequently moved on to the issue of 'investment facilitation', which was identified by the German Presidency in 2017 as one of three priorities in the area of trade and investment. Facilitation includes measures to improve transparency as

well as streamlining administrative procedures and improving the predictability and consistency of regulatory environments (Singh 2017). Proposals for multilateral discussions on investment facilitation were also submitted to the WTO General Council in April and May 2017 by, amongst others, China, Russia, Argentina and Brazil (Singh 2017, p. 3). Discussions on a draft deliverable on investment facilitation at the G20 in May 2017 were intended as preparation for these discussions at the WTO, but reached stalemate when South Africa, India and the US refused to sign onto the draft text (Kanth 2017a). Shortly thereafter India blocked discussion of investment facilitation at the WTO General Council, citing the exclusion of the issue of investment from the WTO's mandate (Kanth 2017b). For its part, South Africa remained opposed to any WTO negotiations on investment facilitation on the grounds that binding rules that are subject to multilateral oversight and dispute settlement in the WTO would constitute an unacceptable constraint on the government's regulatory autonomy.[29]

The next test of South Africa's strategy for engagement with the investment regime and its efforts to avoid being subject to further investment liberalisation and protection provisions in international treaties will be how it responds to the renewed calls for talks on investment in the WTO. That these are now coming from large emerging economies as opposed to the established powers may pose a new challenge and exposes fault lines over trade and investment policy that exist even within the BRICS group. Furthermore, this latest development calls attention to tensions within South Africa's own discursive strategy in relation to investment. In particular, in opposing investment rules in regional and bilateral PTAs, South African officials were keen to portray the country as a committed multilateralist and to argue that the WTO is the proper venue for addressing new trade issues. Yet given that South Africa harbours deep suspicions of binding negotiations on new trade issues in the WTO, it may be accused of hypocrisy if it is seen to be one of the states blocking progress on these issues in multilateral forums. At the regional level, South Africa may invite similar accusations given its approach to the governance of investment on the African continent, where it is principally a capital exporter. Here, it entered into a new BIT with Zimbabwe in order to protect South African investment even after it had initiated withdrawal from the broader treaty regime (Poulsen 2014, p. 11).

Consequently, while norm shopping may be a useful strategy for ambitious rising powers seeking to challenge the authority of more conventionally powerful actors, the strategy may have pitfalls too. First, there is no guarantee that the rising powers as a group will have consistent preferences, or that they will pursue them in similar ways across the global economic governance landscape. Without some level of collective action on the part of the putative representatives of the Global South, these strategies will likely have limited impact. Second, maintaining consistency in normative strategies across multiple organisational settings is likely to be a requirement for the overall success of norm-shopping strategies. Cross-institutional normative strategies that can be portrayed as hypocritical or contradictory may undermine the overall power and legitimacy of norm shopping.

Conclusion

Beginning in the late 2000s, South Africa implemented an investment policy that ran counter to the dominant 'investment protection and liberalisation' norm, while contributing to a broader process of questioning this norm across the investment regime complex as a whole. I have argued that its strategy for doing so can be labelled 'norm shopping' – defined as the selective engagement with and construction of norms situated within complex regimes in order to legitimate and justify negotiating positions or policy proposals. This strategy, in turn, relied on the unevenness and normative ambiguity of the regime complex for investment, as well as the way in which different parts of the regime were connected through institutional linkages. Specifically, I identified two key norm-shopping tactics on the part of South Africa. The first involved discursive appeals to the rules and processes of an overarching multilateral institution (the WTO) in order to contest the actions of a more conventionally powerful actor (the EU) in a nested negotiating setting (the EPA negotiations). The second involved contributing to normative innovation in one organisation linked to the regime complex (UNCTAD), before using those norms to justify action in relation to a more central part of the regime (the network of BITs). Together, these tactics allowed South Africa to justify a set of actions that diverged

with the central normative framework of the investment regime complex without appearing exit or contravene the regime altogether.

This account presents a challenge to conventional ways of viewing the political consequences of regime complexity. Existing accounts of regime complexity predict that the fracturing of multilateral institutions and the proliferation of overlapping governance venues will lead to a transition from rules-based to power-based forms of governance. These accounts are based on a view that privileges state power, and that views this power principally in terms of material coercion. In this context, few scholars have actively engaged with the question of how those states outside of the core group of great powers can engage strategically with complex regimes. In order to address this question, my approach brought in two core contributions from 'critical' constructivist literatures in IR. First, I extended existing claims about the ambiguity of international norms in order to apply these to situations of regime complexity. Second, I emphasised the role of strategic rhetorical action in the operation of power and the embeddedness of this rhetorical action within established institutional structures that help to set the parameters of legitimate behaviour on the global stage. This approach allowed me to emphasise the way in which complex regimes create opportunities for the contestation of dominant norms through strategic and selective engagement by actors that lack the material capabilities of established or emerging great powers. In this way, the article provides a counterpoint to claims that regime complexity automatically presages a return to power-based politics as well as exploring norm shopping as a specific strategy through which aspirant rising powers can engage with complex institutional environments in global economic governance.

Notes

[1] The analysis draws on publicly available documents from the South African government, WTO, UNCTAD, the EU and others, as well as a series of interviews and background briefings conducted by the author in South Africa and Botswana in 2011-12 and in South Africa in 2017. The first set of interviews focused on negotiations for an Economic Partnership Agreement between Southern Africa and the EU and the second set on South Africa's decision to terminate

BITs. The relevant interviews numbered 30 in total. The interviews were conducted with ethics approval from the University of Sheffield (first set of interviews) and University of York (second set of interviews). Interviewees were informed that the responses they gave would be used in published material and were offered anonymity in order to enable them to speak freely – most of the interviews are therefore cited anonymously.

[2] On the contemporary rise of multipolatiry and deadlock in the Doha Round, see Capling and Higgott 2009, Mattoo and Subramanian 2009, Aggarwal and Evenett 2013, Laïdi 2014, Gamble 2015, Muzaka and Bishop 2015.

[3] Like Krebs and Jackson (2007), I acknowledge that it is very difficult to determine empirically the 'true' motivations for actors' behaviour and doing so is not necessary for the purposes of this article, which is more interested in strategy that intent. My assumption is that agents act strategically and on the basis of interests, but that these interests and strategies are infused with social norms (see Seabrooke 2006, Murray-Evans 2019).

[4] For extended analyses of the international organisations and agreements that deal with cross-border investment, see UNCTAD 2004, Vandevelde 2005, Elkins *et al*. 2006, Reiter 2006, Woolcock 2011, 2015, Bonnitcha *et al*. 2017.

[5] A number of insightful explorations of South Africa's foreign policy in this period are available (Hamill and Lee 2001, Bischoff 2003, Taylor and Williams 2006, Alden and Le Pere 2009, Serrão and Bischoff 2009).

[6] Confidential interview with a South African government official, October 2017.

[7] The investment provisions listed are those that were included in the Cariforum EPA – the only comprehensive EPA thus far concluded between the EU and an ACP region (see Heron 2011, Bishop *et al*. 2013). While the EPA did not include post-establishment protections, Gus Van Harten (2008, p. 2) argues that the MFN clause could be read expansively to incorporate post-establishment protections from other investment treaties.

[8] The SADC Strategic Framework suggested that Least Developed Countries (LDCs) should not have to offer reciprocal tariff liberalisation because these countries could instead access the EU market via the EU's unilateral Everything but Arms (EBA) scheme (SADC 2006, p. 44–5).

[9] Confidential interview with a South African government official, May 2017.

[10] The countries involved were Austria, Belgium and Luxemburg, Denmark, Finland, France, Germany, Greece, Italy, the Netherlands, Spain and Switzerland.

[11] Confidential interview with a South African government official, October 2017.

[12] Confidential interview with a South African government official, October 2017.

[13] For example, in a speech about ICSID in 2012, President Hugo Chavez justified Venezuela's turn against the investment treaty regime by saying, '[W]e are not going to bow down to imperialism and its tentacles!' (quoted in Bonnitcha *et al*. 2017, p. 227).

[14] Confidential interview with a South African government official, October 2017.

[15] Confidential interview with a South African government official, October 2017.

[16] Confidential interview with a South African researcher, May 2017.

[17] Private correspondence with an expert on investment governance and confidential interview with a South African researcher, May 2017.

[18] Draft versions of the Act also placed limits on the protections provided to foreign investors in various ways. For example, the drafts included an expansive definition of actions by the state that should be considered in the public interest and therefore exempt from restrictions on expropriation. However, at the time of writing the regulations that had been published in order to bring the Act into force covered only the section of the Act that dealt with dispute settlement (see Langalanga 2015, 2017).

[19] Confidential interview with a South African government official, May 2017.

[20] Interview with Falk Bömeke, May 2017; confidential interview with a European official, May 2017.

[21] Confidential interview with a South African government official, October 2017.

[22] Interview with Talitha Bertelsmann-Scott, August 2018.

[23] Interview with Falk Bömeke, May 2017; confidential interview with a European official, May 2017.

[24] Interview with Falk Bömeke, May 2017.

[25] For a discussion of NGO opposition to ISDS in TTIP, see De Ville and Siles-Brügge 2015, p. 102-5.

[26] Confidential interview with a South African government official, October 2017.

[27] Confidential interview with a South African government official, October 2017.

[28] Confidential interview with a South African government official, October 2017.

[29] Confidential interviews with South African government officials, May and October 2017.

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